

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

TRACEY A. NECAK

Plaintiff,

v.

SELECT PORTFOLIO SERVICING, INC.

Defendant.

CASE NUMBER: 1:17-cv-1473

JUDGE: Donald C. Nugent

**PLAINTIFF TRACEY A. NECAK’S MEMORANDUM CONTRA TO DEFENDANT’S  
MOTION TO DISMISS OR STAY**

**I. INTRODUCTION**

Concurrent with the filing of this Memorandum in response to Select Portfolio Servicing, Inc.’s (“SPS”) Motion to Dismiss or Stay (“Motion”), Mrs. Necak amended her complaint and filed the same as a matter of course pursuant to Fed.R.Civ.P. 15(a) on September 13, 2017. The claims alleged in the Amended Complaint are violations of the federal Real Estate Settlement Procedures Act (“RESPA”) and fraud associated with the servicing of Mrs. Loss mitigation application. SPS’s Motion addresses the allegations in the original Complaint. The filing of the Amended Complaint renders the Motion moot. Therefore, the Court should deny the Motion as moot.

**II. BACKGROUND**

U.S. Bank, N.A., filed their complaint for foreclosure against Mrs. Necak on February 9, 2017 in the Court of Common Pleas for Medina County, Ohio (the “Foreclosure”). In response, Mrs. Necak filed her answer and counter claims on April 7, 2017 (the “Answer”). The Answer contained the single counter claim of “Promissory Estoppel”. (Answer, ¶¶ 98-105). This

counterclaim was based entirely on the promises that U.S. Bank made to Mrs. Necak and did not reference or relate to federal law, including RESPA. (*Id.*). The Answer also made no counter claims based on breach of contract or fraud. (*Id.*).

On July 13, 2017, Mrs. Necak filed her Complaint for Money Damages (the “Complaint”) with this Court against SPS (the “Federal Case”). The claims included those relating to RESPA, Breach of Contract (Promissory Estoppel in the alternative), and Fraud. (Doc. #1 at ¶¶ 79-176). On August 23, 2017, SPS made a Motion to Dismiss or Stay this Action Pending the Resolution of Parallel Litigation in Ohio State Court (the “Motion to Dismiss”). (Doc. #4). In the Motion to Dismiss, SPS claims that Mrs. Necak’s claims in the Complaint should have been compulsory counter claims in the Foreclosure and that abstention now bars Mrs. Necak from asserting her claims. (*Id.*). On September 13, 2017, Mrs. Necak filed the Amended Complaint removing claims for Breach of Contract or Promissory Estoppel in the alternative. Therefore, the Motion is moot.

### **III. LAW & ARGUMENT**

The amendment to the Complaint filed concurrently with this Memorandum moots SPS’s Motion. Fed.R.Civ.P. 15(a)(1)(B) allows a party to amend as a matter of course within 21 days after service of a motion under Rule 12(b), (e) or (f). *Snyder v. Southwest Airlines Co.*, N.D.Ohio No. 5: 15-CV-1406, 2015 WL 5663800, at \*4 (Sept. 24, 2015). In the present action, SPS filed its Motion on August 23, 2017. Mrs. Necak filed the Amended Complaint of right on September 13, 2017. This is the first amendment to the Complaint in this action. The Motion filed pursuant to Rule 12 is based on the original Complaint. Because Mrs. Necak’s allegations have changed, SPS’s Motion should be denied as moot.

#### IV. CONCLUSION

The timely filing of Mrs. Necak's Amended Complaint renders the Motion moot.

Therefore, the Court should deny SPS's motion to dismiss or stay.

Respectfully Submitted,  
DOUCET & ASSOCIATES CO., LPA

/s/ Sean M. Kohl  
Sean M. Kohl (0086726)  
Attorney for Plaintiff Tracey A. Necak  
700 Stonehenge Parkway, Suite 2B  
Dublin, OH 43017  
(614) 944-5219 PH  
(818) 638-5548 FAX  
Sean@Doucet.Law

#### Certificate of Service

I hereby certify that on this 13<sup>th</sup> day of September, 2017, I caused this document to be electronically filed with the Clerk of Courts by using the ECF System, which will send a notice of electronic filing to all parties indicated on the electronic filing receipt, pursuant to Fed.Civ.R.P. 5(b)(3) and Loc.R. 5.1(b) and Appendix B ¶ 14:

Nathan B. Spencer  
DINSMORE & SHOHL LLP  
255 East Fifth Street, Ste 1900  
Cincinnati, Ohio 45202  
Nathan.Spencer@dinsmore.com

/s/ Sean M. Kohl  
Sean M. Kohl (0086726)